

Exhibit 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT MAHAFFY)	
)	
Plaintiff,)	
)	
vs.)	Index No. 09 CV 1593
)	
THE CITY OF NEW YORK; THE)	
NEW YORK CITY DEPARTMENT OF)	
EDUCATION; BRONX AEROSPACE)	
ACADEMY HIGH SCHOOL; and)	
BARBARA KIRKWEG, in her)	
official and individual)	
capacities,)	
)	
Defendants.)	
-----)	

VIDEOTAPED DEPOSITION OF BARBARA KIRKWEG

New York, New York

Tuesday, May 25, 2010

Reported by:
MICHELLE COX
JOB NO. 19226

Kirkweg

Q. Did you have any other periods of --
any gaps in that service or --

A. No. Well --

Q. -- was it continuous?

A. -- when I went to ROTC. When I went
to college, I was out.

MR. KRETZ: Let him finish the
question, please.

Q. And you went to college at Embry
Riddle.

You finished in 1984, right?

A. Right.

Q. When did you start?

A. I started part-time in 1976. And
full-time in 1982.

Q. So during the period from '76 to
'82, you were part-time, still in the Air Force?

A. Yes.

Q. From '82 to 1984 you were full-time
and out of the Air Force?

A. Correct.

Q. And then you went back in on active
duty upon your graduation in 1984?

A. Right.

Kirkweg

Q. Where were you employed following your retirement from active duty in July 1996?

A. At New York City Department of Education.

Q. And what was your position?

A. I was senior aerospace science instructor.

Q. With which school?

A. Evander Childs High School. Evander Childs High School.

Q. And what were your duties as senior aerospace science instructor at Evander Childs High School?

A. Started the program there and talked to parents and students about becoming members of the Air Force Junior ROTC. Operating the Junior ROTC Corp. Teaching the -- the officer part of the course.

Q. Anything else?

A. The normal duties that would be associated with being a -- a department, sort of chairperson.

Q. So as senior aerospace science instructor, you were a department chairperson?

Kirkweg

A. We're considered department chairpersons.

Q. Considered by whom?

A. The Air Force and the principal of the school.

Q. And what -- what does it mean to be considered the department chairperson?

A. Well, it means that you don't need to have a supervisor's license. But they consider you at the meetings that you have input as if you were a department head. And you are known to be responsible for the department.

Q. Now, were you there other employees in this department?

A. One.

Q. One at the time that you --

A. I'm sorry?

Q. You say one.

Is it one at the time that you began --

A. Yes.

Q. -- as -- okay.

And what -- what other portion was this?

1 Kirkweg

2 A. No. Major Kelly was the senior
3 aerospace science instructor.

4 Q. At the same time as you were?

5 A. No.

6 Q. So what position did you hold when
7 Major Kelly was the senior aerospace science
8 instructor?

9 A. That's -- I was transitioning to the
10 principalship.

11 Q. So when did you begin to transition
12 to the principal position?

13 A. Between 2001 and 2002.

14 Q. So you said Major Kelly started in
15 2000, right?

16 A. I'm not sure. It was 2000 or 2001.
17 I don't know. You'd have to check the record.
18 I don't know.

19 Q. Okay. Any other -- any other
20 aerospace science instructor or senior aerospace
21 science instructors employed other than Sergeant
22 Williams, Major Kelly, Sergeant Picone at
23 Evander Childs High School?

24 MR. KRETZ: During the period of
25 time before she became principal?

Kirkweg

A. That when people want to disagree they grieve.

Q. Do you have any involvement in the grievance process?

A. Yes. I participate in the hearing.

Q. What about -- do you -- do you have any involvement in the step one grievance?

A. I either uphold it or deny it.

Q. So step one always comes to you as principal first?

A. Yes.

Q. Have you ever upheld a step one grievance?

A. Yes.

Q. In what instance?

A. I believe I upheld the step one grievance in the -- in the case of the sergeants requesting a different time schedule.

Q. And when was that grievance filed?

A. January, February of 2008.

Q. So that was a grievance that -- that they filed?

A. It came to me. So it was a grievance, yes.

Kirkweg

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Q. And who brought it to you?

A. My UFT rep.

Q. And who is that?

A. Ms. Appiah. Appiah, A-P-P-I-A-H.

Q. And how did she bring it to you?

A. She spoke to me.

Q. And what did she say when she spoke
to you?

A. That the sergeants objected to their
time schedule.

Q. Did she say anything else other than
that the sergeants objected to their time
schedule?

A. That they wanted her to notify the
Bronx UFT that they objected.

Q. And what was your -- what was your
response to the step one grievance?

A. That she should notify the Bronx
UFT.

Q. Did she?

A. Yeah, she did.

Q. And what happened next?

A. And then I received a telephone call
from Ms. Lynn Winderbaum at the Bronx UFT.

Kirkweg

Q. And what did Ms. Winderbaum say?

Why did -- strike that.

Why did Ms. Winderbaum contact you?

A. Because she wanted to speak to me about the schedule.

Q. And what did she say about the schedule?

A. She said that I should change their schedules.

Q. And did you?

A. I did.

Q. Why did you --

A. I had my AP do it.

Q. Why did you change the schedule?

A. Because they objected to it, and I do not believe that people who are forced to work hours that they don't want to work are good for children.

Q. No. Why did you change the schedule?

A. Because they didn't want to work the hours.

Q. So you had said that you believe -- you didn't believe that people that objected to

1 Kirkweg

2 the schedules that they were given were good for
3 children?

4 A. I believe that if people --

5 MR. KRETZ: Objection.

6 A. -- are forced to work hours that
7 they are grieving, that they are in disagreement
8 with, that it's not going to be good for
9 children to be with those people during those
10 times.

11 Q. Why did you believe that?

12 A. Because I think it's an unhealthy
13 situation to force people into situations with
14 children when they were clearly stating that
15 they didn't want to be there.

16 Q. And how were they clearly stating
17 that they didn't want to be there; by filing a
18 grievance?

19 A. They were stating that they wanted
20 to work less hours than they had agreed to work.

21 Q. And this was done by contacting the
22 -- the union?

23 They spoke to the -- they spoke to
24 the chapter leader that came to you and went to
25 the -- the -- strike all that.

1 Kirkweg

2 filed a grievance over during his employment?

3 A. He filed a grievance when he was
4 terminated. He filed a grievance for pay,
5 for -- that he didn't get adequate overtime pay.
6 Those are the two that I remember. There were
7 probably more. I don't remember.

8 Q. What about the grievance over the
9 schedule change; was he involved in that?

10 A. Oh, yes. I forgot that. Yes.

11 Q. So did he file a grievance over the
12 schedule change?

13 A. I don't know who personally did it.
14 The UFT chapter leader brought it to me. I
15 don't know who had brought it to her. I assumed
16 it was him.

17 Q. Why did you assume it was him?

18 A. Because he was the -- at the time,
19 the senior aerospace science instructor, and the
20 others were taking their lead from him.

21 Q. Do you recall whether or not
22 Sergeant Mahaffy filed a grievance related to an
23 unsatisfactory rating?

24 A. I don't remember. He could have. I
25 don't remember.

Kirkweg

Q. During the course of Sergeant Mahaffy's employment with Bronx Aerospace, do you recall any grievance filed by other teachers?

A. During the time that he was there, no. But it doesn't mean it didn't happen. I just don't recall.

Q. You just don't recall.

MR. FILOSA: Why don't we take a break for a minute.

MR. KRETZ: Sure.

THE VIDEOGRAPHER: The time is 12:13 p.m. Going off the record.

(Recess taken.)

THE VIDEOGRAPHER: The time is 12:24 p.m. We're back on the record.

Q. Ms. Kirkweg, do you know when Sergeant Mahaffy's employment with the school began?

A. 2007, winter. February or March.

Q. And do you know if he applied for a position at the school?

A. He applied to the Air Force, and they nominated him to the school.

Kirkweg

Q. Did you interview him for a position?

A. I interviewed him a couple of times.

MR. FILOSA: Could you mark this as 1. Kirkweg 1.

MR. KRETZ: Thank you.

(Kirkweg Exhibit 1, Document Entitled "Interview of AFJROTC Instruction Applicant," marked for identification as of this date.)

Q. You're being shown a document that's been marked as Kirkweg Exhibit 1. It's a two-page document Bates numbered RM0258 to 259.

Please take a moment to review the document. Let me know when you're ready.

A. Okay.

Q. Do you recognize this document?

A. No.

Q. Have you ever seen it before?

A. No.

Q. Do you know what it is?

A. Apparently it's an interview that Mr. Mahaffy had at Aviation High School.

Q. And was this provided to you when

Kirkweg

A. No.

Q. Following Sergeant Mahaffy's interviews with you, did you hire him for the position?

A. I did.

Q. What position was he hired for?

A. For aerospace science instructor.

Q. And did you need anyone's approval to hire Sergeant Mahaffy?

A. No, I didn't.

Q. And why did you hire him for the aerospace science instructor position?

A. Because I had an advertised vacancy, and I needed someone to fill it.

Q. Did you feel that he would be a good fit for the position?

A. At the time of the interview, of course.

Q. Now, if you look at Page 2 of what's been marked has Kirkweg Exhibit 1, the first sentence of -- if you look at the bottom of Page 2 it says, "Applicant's overall qualifications." The first sentence says: "Sergeant Mahaffy is the kind of dedicated, motivated NCO we want to

1 Kirkweg

2 attract to the program."

3 At the time of your -- at the time
4 that you interviewed Sergeant Mahaffy, did you
5 agree with that?

6 A. I hadn't seen this, so I couldn't
7 agree or disagree with it.

8 Q. But at the -- based on your
9 interviews, did you feel that Sergeant Mahaffy
10 was a dedicated, motivated NCO, the type that
11 the Air Force wanted to attract to the program?

12 MR. KRETZ: Objection.

13 A. I believe that he was the one who
14 was qualified for the position. I had a
15 vacancy. I could not, through an interview,
16 determine these types of attributes.

17 Q. Why couldn't you?

18 A. Because you would have to know the
19 person to tell whether or not they were
20 dedicated and motivated. You could not tell
21 that by two interview sessions.

22 Q. So it was two interviews that you
23 had with him?

24 A. I did, yes.

25 Q. At the time that you hired Sergeant

1 Kirkweg

2 Mahaffy, did you have any understanding as to
3 whether the Air Force JROTC instructors were
4 covered by the collective bargaining agreement?

5 A. I didn't have an understanding one
6 way or the other. It was not something that
7 came up.

8 Q. So you don't know if they were
9 characterized as a teacher, a substitute
10 teacher?

11 A. Well, I know that they were subs.
12 But that's not -- I didn't discuss the union
13 with them at their interview.

14 Q. Did you ever discuss their union
15 status with Sergeant Mahaffy?

16 A. No. I discussed with the UFT rep
17 when she brought the grievance to me, but --

18 Q. What about his status as whether or
19 not he was a teacher, a substitute teacher, a
20 regular substitute?

21 A. That's not defined by myself.
22 That's defined by the fact that ROTC instructors
23 do not have a license that New York City
24 ascribes to be a teacher. They are a
25 supplementary personnel. And, therefore, they

1 Kirkweg

2 are substitute teachers.

3 Q. Did you ever discuss this with
4 Sergeant Mahaffy?

5 A. No.

6 Q. Did he ever ask what his job
7 classification was?

8 A. He filled out a supplementary
9 personnel application in order to acquire the
10 job. So the assumption would be that he knew
11 it.

12 Q. And is a copy of the supplementary
13 application in his personnel file?

14 A. I produced a -- a copy of it for the
15 reproduction. I assume the one that he
16 completed is in his file.

17 Q. And this is a supplementary
18 personnel --

19 A. Personnel --

20 Q. -- application?

21 A. -- application, yes.

22 Q. Did you ever consult with the
23 Department of Education to determine what the --
24 Sergeant Mahaffy or any other aerospace science
25 instructor, what their job classification was?

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A. Yes.

Q. Okay. And is the -- the copy -- the e-mail that was quoted in the complaint?

A. Yes.

Q. Okay.

MR. FOLEY: Just objection.

Q. And why did you write this e-mail to Sergeant Mahaffy?

A. Because I thought that he had completed an outstanding job in our bridge program.

Q. And at the time you wrote that you did believe that?

A. Yes. It was one week, and it was good.

Q. In you -- you -- in the e-mail you state, "Our school is very lucky, and our kids are blessed to have you as our SASI."

A. Right.

Q. And you -- you agree with that statement at the time you wrote it?

A. Yes.

Q. And what is -- what is the bridge program?

Kirkweg - Confidential

Q. And how did this make them physically incapable of completing the extracurricular activities?

A. They were not able to work a late day with the students. They were not able to participate in weekend events.

Q. How long had Sergeant Picone been working at the school?

A. Since the school began.

Q. Since the school began?

A. Since -- we came to the ROTC at the same time.

Q. How --

A. Since '96.

Q. Okay. And when -- when did he develop a heart problem?

A. I'm not sure when he developed it. I don't know.

Q. When were you made aware of it?

A. A couple of years before I asked him to resign.

Q. So he had -- he had been able to perform this -- this position for a couple of years before you came to the conclusion that he

1 Kirkweg

2 MR. KRETZ: Objection.

3 A. I don't know.

4 Q. Did you decide to relieve them of
5 their duties as instructors at Bronx Aerospace?

6 MR. FOLEY: Objection.

7 MR. KRETZ: Objection.

8 A. I did. I asked them -- in the
9 letter that I gave to them that -- that is what
10 I would like to do.

11 Q. So how is that different than
12 terminating them?

13 MR. KRETZ: Objection.

14 A. They were not terminated; they
15 resigned.

16 Q. How is that different than
17 threatening that if they didn't sign the letter
18 they would be terminated?

19 MR. KRETZ: Objection.

20 A. It was not a threat.

21 Q. How was it not a threat?

22 A. It was not a threat.

23 Q. But if they didn't sign the letter,
24 they would have been relieved of their position,
25 correct?

1 Kirkweg

2 MR. KRETZ: Objection.

3 A. Do not -- I have never said that.

4 Q. So what does it mean to relieve them
5 -- to relieve you of your instructor duty?

6 A. That was my intent.

7 Q. Is that -- is that different than
8 terminating their employment?

9 A. Termination has different
10 connotations than a resignation. For instance,
11 Sergeant Picone went to look for a position at
12 another school in New York City, which would
13 have been unlikely had he been terminated.

14 Q. But I'm saying, though, if he hadn't
15 resigned, would he have been terminated?

16 MR. KRETZ: Objection.

17 A. I had not thought that far ahead.

18 Q. Okay. Did either Picone or Williams
19 object to being asked to resign?

20 A. Not at all.

21 Q. Do you know if they filed any
22 complaint related to their resignation?

23 A. Afterward, they filed a grievance
24 that they had not signed the letters.

25 Q. Do you know who they filed this

Kirkweg

UFT.

Q. And what did they notify -- and what did the chapter leader notify you of?

A. That they wanted to work the same schedule as appointed teachers.

Q. Did they say whether or not that was consistent with the -- did the chapter leader say whether or not that was required under the contract?

A. The chapter leader did not.

Q. Did Ms. Winderbaum say whether or not that was required under the contract when you spoke to her?

A. She did.

Q. And she said that it was required under the contract?

A. She told me that I should give them the same hours as teachers because subs should be treated as teachers.

Q. Did you agree with that, that they should be treated as teachers?

A. I did not agree that they should work the same hours, no.

Q. Why didn't you agree with that?

Kirkweg

A. Because they were paid 30 percent more. They weren't required to have college degrees, and they weren't required to be certified.

Q. So why did all that lead -- why did all of that lead you to believe that they shouldn't be required to work the same hours?

A. They were paid 30 percent more.

MR. KRETZ: Objection.

A. They didn't have certification requirements.

Q. And did you have any understanding at that time of whether or not they are teachers -- whether or not under the collective bargaining agreement they should be treated as teachers?

A. I took Ms. Winderbaum at her word.

Q. Did you have any understanding of what the collective bargaining agreement required?

A. Not particularly.

Q. And why not?

MR. KRETZ: Objection.

A. I don't know.

1 Kirkweg

2 MR. FOLEY: Objection.

3 A. No.

4 Q. Did you explain to -- did you
5 explain to Sergeant Mahaffy that he had
6 previously agreed to -- to work the eight-hour
7 schedule?

8 A. No.

9 Q. Why not?

10 A. Because the grievance indicated that
11 they were not willing to work the eight-hour
12 schedule. And as I had stated, I did not want
13 to place people with children who were not
14 agreeable. It was not a healthy situation.

15 Q. Why wasn't it -- why did you believe
16 that it wasn't a healthy situation?

17 A. Because children need people who
18 want to be with them. They don't need people
19 who are being forced to be with them.

20 Q. So you didn't explain to Sergeant
21 Mahaffy or question why he was filing a
22 grievance when he had previously agreed to work
23 the eight-hour schedule?

24 A. I concluded that it was as a result
25 of the budget cuts.

Kirkweg

Q. What did you do following -- strike that.

You talked about as part of your -- you had -- you had a phone conversation with Lynn Winderbaum of the -- of the UFT --

A. She telephoned me.

Q. -- about the grievance.

What did you do following that conversation?

A. I requested that the sergeants' schedule be changed to match that of appointed teachers.

Q. And who did you make that request to?

A. Ms. Mandell.

Q. Did she follow through with that request?

A. She did.

Q. As part of your response -- strike that.

Following -- following the grievance, was Sergeant Mahaffy removed from the senior aerospace science instructor position?

A. He was.

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Q. And why was that?

A. Because he had to be scheduled for 6 hours and 50 minutes. And he could not be scheduled for 6 hours and 50 minutes with the other two sergeants because the classes were in excess of that time frame.

Q. So the SASI position was -- was then vacant?

A. Yes, it was.

MR. FOLEY: Objection.

Q. And did you anticipate filling that position?

A. Ms. Talley agreed to readvertise it immediately.

Q. And if you filled that position, would that -- what schedule would be assigned to whoever filled that position?

MR. KRETZ: Objection.

A. An eight-hour schedule.

Q. Even though the -- under the contract the teachers were limited to a 6-hour-50-minute schedule?

A. The Air Force requirement is that they be treated as a department head.

1 Kirkweg

2 Department heads worked eight hours.

3 Q. Okay. So you -- you wanted someone
4 -- a SASI that would work the eight-hour
5 schedule?

6 A. They were required to work an
7 eight-hour schedule if they were to be treated
8 as a department head.

9 Q. Had Sergeant Mahaffy not filed a
10 grievance, would he have remained the senior
11 aerospace science instructor?

12 A. I don't know.

13 Q. Did you have any intention of
14 removing him from that position prior to the
15 grievance?

16 A. I hadn't thought about it.

17 Q. Can you think -- okay.
18 Had Sergeant Mahaffy agreed to
19 continue working the eight-hour schedule, would
20 he have remained in the senior aerospace science
21 instructor position?

22 MR. KRETZ: Objection.

23 A. I wouldn't have asked -- I would not
24 have asked someone who filed a grievance to
25 continue to work hours that they had

1 Kirkweg

2 that of appointed teachers.

3 Q. Who required that?

4 A. The UFT.

5 Q. Now, as a result of Sergeant Mahaffy
6 no longer being the SASI, did the other
7 instructors -- was he still considered a
8 department chair?

9 A. No.

10 Q. Did the other aerospace science
11 instructors continue to report to him?

12 A. They never reported to him. This
13 was a waiver. He could not have written them
14 up. They was -- no, they did not report to him.
15 They were not there at the same time as him.
16 They could not report to him.

17 Q. So he couldn't -- he couldn't
18 supervise them if he wasn't physically in the
19 building when they were there?

20 A. That's right.

21 Q. And is that -- is that a school
22 policy?

23 A. I believe it's a commonsense policy.

24 Q. How so?

25 A. That I have no knowledge of what

Kirkweg

you're doing if I'm at home.

Q. So for any supervisor, they have to be present during all hours that their report is working --

MR. KRETZ: Objection.

Q. -- is that your opinion?

A. Unless they have somebody to delegate that to who was in a position to be responsible for it.

Q. Were the other teachers made aware that Sergeant Mahaffy was no longer the SASI?

A. I have no idea.

Q. Did you notify any of the other teachers that he was no longer the SASI?

A. I notified the Air Force as I was required to so that they could readvertise the position. I had no need to notify teachers.

Q. Were any of the students made aware that Sergeant Mahaffy was no longer the senior --

A. I'm not sure.

Q. -- aerospace science instructor?

A. I don't know if he told them. I did not speak to children about it.

1 Kirkweg

2 What does -- what does that mean?

3 A. That he is at the place where
4 students were scanned for contraband.

5 Q. So is that the entrance to the -- to
6 the building?

7 A. Yes.

8 Q. Now, if you see "Period 1, Hallway
9 Duty."

10 So there's only one entry for
11 hallway duty on this schedule?

12 A. Right.

13 Q. Is that because he has less time,
14 less free time to be assigned hallway duty?

15 A. That would be the immediate answer.

16 Q. Did the -- did the assignment of the
17 students -- strike that.

18 Did the students that Sergeant
19 Mahaffy was assigned to during this period
20 change as a result of the schedule change?

21 A. I think all of the teachers'
22 schedules changed pretty much.

23 Q. And why is that?

24 A. Because changing a schedule for
25 three people has a domino effect.

1 Kirkweg

2 senior aerospace science position?

3 MR. FOLEY: Objection.

4 A. For the one year that I had required
5 -- that I had requested him to do so.

6 Q. Okay. At this point in time, how
7 long had he filled the senior position?

8 A. Four or five months.

9 Q. And when did you submit the waiver
10 for him to fill the position?

11 A. In March or April upon his --
12 shortly after he began. Four -- four to six
13 weeks after he started.

14 Q. Did you retain a copy of that
15 document?

16 A. Which document?

17 Q. The -- whatever the waiver.

18 Is it -- is it a document, the
19 waiver?

20 A. No. It was just a verbal, I guess,
21 you know -- it was my requesting the Air Force
22 and their saying, yes, he can.

23 Q. So you had made a verbal request to
24 the Air Force that Sergeant Mahaffy be given a
25 one-year waiver to fill the senior position?

Kirkweg

A. Yes. Apparently so.

Q. And you felt that you owed him a debt of gratitude?

A. That's what I said.

Q. Do you know why you sent this?

A. I believe I forwarded to him a Google earth that had been forwarded to me; as Bronx Aerospace was the only full-time Air Force Junior ROTC in the country. And it was, I think, something to be proud of.

Q. You go on to say, "You're a wonderful group. I know that."

At that time did you believe that Sergeant Mahaffy and the other aerospace science instructors were a wonderful group?

A. Absolutely.

Q. And why is that?

A. Because at that time they were doing a good job.

Q. And you go on to say, "I am grateful for what you do for our kids."

At the time you wrote that e-mail, why were you grateful for what they did for the kids?

1 Kirkweg

2 A. Well, there -- I think there had
3 been outside activities. They were working
4 evenings. And I thought it was a positive
5 experience for the children.

6 (Kirkweg Exhibit 18, E-mail Chain,
7 marked for identification as of this
8 date.)

9 Q. You've been shown a document marked
10 Kirkweg Exhibit 18. It's a one-page document
11 Bates stamped D003755. Let me know when you've
12 had a chance to review it.

13 A. Okay.

14 Q. Now, this is an e-mail from you.

15 Is that to Sergeant Mahaffy again?

16 A. Apparently, he had e-mailed me,
17 asking me to let the headquarters know that he
18 was now considered a SASI, and I responded to
19 him by doing that.

20 Q. And copying Jo Talley from the Air
21 Force?

22 A. Right. Right.

23 Q. And in the e-mail you -- the third
24 sentence, "I want to sincerely thank you for
25 finding a great fit for our school in Sergeant

Kirkweg

Mahaffy."

A. Right.

Q. At the time that you wrote this, did you believe that Sergeant Mahaffy was a great fit for the school?

A. I did.

Q. Why did you believe that?

A. Because at the time he was doing a good job.

Q. Now, why did you believe he was doing a great job?

A. I said he was doing a good job.

Q. Why did you believe he was doing a good job?

A. Because he was, as far as I knew, engaging the children. And the ROTC seemed to have, after the bridge program, been off to a good start. This was just one month after the bridge program. This was the second week of school.

Q. Now, at some point did your impression of Sergeant Mahaffy's fit for the school change?

A. It did.

1 Kirkweg

2 Q. And when was that?

3 A. Well, there were a number of items
4 that happened in the spring of 2008 that led me
5 to that belief.

6 Q. Was the first that he filed a
7 grievance with the union?

8 A. No.

9 Q. But it was after he complained to
10 the union about his work schedule, right?

11 A. Well, I mean, I think that was an
12 indication that he was not, you know, interested
13 in necessarily putting children first.

14 Q. Because he wanted to be paid for the
15 time that he was working?

16 MR. KRETZ: Objection.

17 A. No. Because he said he wanted to
18 work 6 hours and 50 minutes.

19 Q. And why did you believe that that
20 was an indication that he wasn't putting the
21 children first?

22 A. Because children can need people
23 after 6 hours and 50 minutes.

24 Q. Did you feel that by filing the
25 grievance he wasn't dedicated to the school?

Kirkweg

result of that and a number of other, what I consider to be, things that demonstrate that children were not coming first.

Q. Now, did other teachers at the school work a 6-hour-50-minute schedule?

A. Some did.

Q. And did you feel that they weren't putting the students first?

A. Not necessarily.

Q. Why not?

A. Because they weren't Junior ROTC instructors, and that was not their goal.

Q. So you had a different set of standards for the Junior ROTC instructors?

A. They were paid 30 percent more.

Q. Now, at the end of the 2007/2008 school year, did you fill out a performance rating for Sergeant Mahaffy?

A. I did.

Q. And did you rate him unsatisfactory?

A. I did.

Q. Do you recall whether he appealed this rating?

A. I believe he grieved it. I think he

1 BARBARA KIRKWEG

2 about resignation?

3 Let me just read it. No, it
4 doesn't.

5 Q. The letter states, though, the
6 cause -- it lists a number of causes for
7 termination, correct?

8 A. Yes.

9 Q. I'm just going to run through
10 the list here. It says that he received
11 three letters to file; is that correct?

12 A. Yes.

13 Q. And two written complaints
14 regarding unprofessional behavior by the
15 department chair?

16 A. Yes.

17 Q. And two written complaints from
18 the parent coordinator?

19 A. Yes.

20 Q. And one unsatisfactory lesson
21 observation?

22 A. Okay. One, yes.

23 Q. Now, we also talked about the
24 statement that you based -- the statement
25 from the student that you based your

1 BARBARA KIRKWEG

2 done in the classroom by Ms. Mandel.

3 Q. The date of this report is
4 February 6, 2008 -- I'm sorry, strike that.

5 The date of the observation is
6 February 6, 2008, correct?

7 A. Right.

8 Q. Is this one of the documents
9 that's referenced in the termination letter
10 that we discussed earlier?

11 A. Yes.

12 Q. Now, who conducted this
13 observation?

14 A. This was the principal,
15 Ms. Mandel.

16 Q. Why did she conduct the
17 observation?

18 A. Because that's her job, to
19 observe teachers.

20 Q. Does she conduct the
21 observations for all teachers at the
22 school?

23 A. Yes.

24 Q. Does anyone else assist in
25 conducting observations?

1 BARBARA KIRKWEG

2 you know?

3 A. Because he asked people three
4 times to pick up their head and stop
5 talking.

6 Q. But you weren't there, right?

7 A. No, I'm reading this.

8 Q. So, who do you think is in a
9 better position to evaluate the teacher's
10 observation, someone that's actually there
11 or someone that's just reading the report?

12 MR. FOLEY: Objection.

13 A. What I'm trying to explain is
14 that Ms. Penn clearly was not aware of good
15 bell-to-bell instruction if she assumed
16 that having to ask children twice to stop
17 talking and three times to lift their heads
18 up was consistent with being engaging.

19 MR. FILOSA: 27.

20 (Plaintiff's Exhibit

21 Kirkweg-27, a document bearing Bates
22 number D005963, marked for
23 identification, as of this date.)

24 Q. Ms. Kirkweg, you've been shown
25 a document that has been marked as Kirkweg

1 BARBARA KIRKWEG

2 Exhibit 27. It's a one-page document Bates
3 numbered D005963.

4 Please review --

5 A. Oh, I did put it in her file.
6 I remember I heard about it in November,
7 but I didn't remember placing it in her
8 file, but I did.

9 Q. Please let me know when you've
10 had a chance to review the document.

11 A. I have reviewed it.

12 Q. You indicate -- the bottom
13 sentence of the letter indicates, "it's
14 been place inside Ms. Penn's permanent
15 file."

16 A. Yes, I did not recall placing
17 it in her file. I recall writing it to
18 her. But, apparently, I did place it in
19 her file.

20 Q. Did you consider this a
21 reprimand?

22 A. No.

23 Q. Why not?

24 A. Well, as I said, I think that
25 she needed to know, you know, something

1 BARBARA KIRKWEG

2 that had just been assigned to Sergeant
3 Mahaffy; is that correct?

4 A. Well, yes, they had been
5 assigned shortly before.

6 Q. Why were they assigned shortly
7 before?

8 A. There were a number of changes
9 that had to occur once the sergeants had
10 demanded to work the same hours as
11 teachers. And there was a ripple effect,
12 and I think that as the kids were sorted
13 out, this may have been one of the
14 byproducts of that.

15 Q. Now, you said a number of
16 changes had to be made.

17 A. Right.

18 Q. This is following Sergeant
19 Mahaffy and the other sergeant's grievance
20 about their work schedule?

21 A. They're refusing to work their
22 schedule. So, we had to change pretty much
23 all of the schedules.

24 Q. So, what changes -- you said
25 there were a number of changes that had to

1 BARBARA KIRKWEG

2 be made. What changes had to be made?

3 A. Teachers, students, classrooms.
4 It reeked havoc with the schedule.

5 Q. So, all teachers' schedules
6 were changed?

7 A. I didn't say all. I said a
8 number of.

9 Q. How many?

10 A. I'm not the scheduler. I know
11 that it was extremely difficult to
12 straighten out the spring semester once
13 that determination was made.

14 Q. As a result of that, teachers'
15 schedules were changes?

16 A. No children's -- well, their
17 schedules were changed. The ROTC teachers'
18 schedules were changed.

19 Q. Were any teachers?

20 A. No. Classrooms had to be
21 changed and children had to be assigned to
22 different places and I'm saying this could
23 have been as a result of that.

24 Q. The students, their individual
25 schedules --

1 BARBARA KIRKWEG

2 A. Yes.

3 Q. -- were changed?

4 A. Yes.

5 Q. The classrooms that they
6 attended --

7 A. Yes.

8 Q. -- were changed.

9 And the teachers' schedules,
10 were some of them changed as well?

11 A. No, not their times, but what
12 they were teaching at the time.

13 Q. So, Sergeant Mahaffy was
14 teaching a number of students and their
15 schedules were changed in the middle of the
16 semester and he hadn't taught them for the
17 whole marking period. Is that fair to say?

18 A. I'm not sure when it was
19 changed. What I'm saying is that this
20 could have been a result of the numerous
21 changes which had to be made because of
22 their refusal to work their previous
23 schedule.

24 Q. Now, did you discuss this
25 letter to the file with Ms. Mandel before

1 BARBARA KIRKWEG

2 A. Yes.

3 Q. Was a copy of this provided to
4 Sergeant Mahaffy?

5 A. I don't recall.

6 Q. Did you receive a copy of this?

7 A. Yes.

8 Q. When did you receive it?

9 A. It's dated on the 9th. I
10 assume I got it about the same time.

11 Q. But you don't know if it was
12 provided to Sergeant Mahaffy?

13 A. I don't know.

14 Q. What did you do upon receiving
15 the note?

16 A. Nothing.

17 Q. Did you think that it required
18 any further action?

19 A. Well, no.

20 Q. Did you discuss it with
21 Sergeant Mahaffy?

22 A. I don't recall. I don't know
23 how it would legislate something that had
24 already occurred.

25 Q. Did you think it was something

1 BARBARA KIRKWEG

2 that you could address with Sergeant
3 Mahaffy so that you could know in the
4 future to take a different approach if you
5 felt that his conduct was somehow lacking?
6 Shouldn't you have addressed it with him so
7 that he knows that?

8 A. No.

9 Q. Why not?

10 A. Because I think that this is an
11 example of personality, and I don't think I
12 have any control over his personality.

13 Q. You don't think you have any?

14 A. I don't think I can control his
15 personality, correct.

16 Q. Did you talk to Sergeant
17 Mahaffy to determine whether or not this
18 did, in fact, occur?

19 A. I don't recall talking to him,
20 no. I did not see any reason why it would
21 be fabricated.

22 Q. What was done with this note
23 once you received it -- strike that.

24 Was this maintained in his
25 school file?

1 BARBARA KIRKWEG

2 Q. Do you recognize the document?

3 A. Yes.

4 Q. What is it?

5 A. It is a letter from the parent
6 coordinator documenting an incident that
7 happened with Mr. Mahaffy.

8 Q. Is this one of the written
9 complaints from the parent coordinator
10 that's referenced in the May 3, 2008
11 termination letter?

12 A. Yes.

13 Q. This is written by Chandra
14 Joseph?

15 A. Yes.

16 Q. Have you seen this before?

17 A. Yes, I presented it.

18 Q. Sorry?

19 A. Yes, I presented these
20 documents.

21 Q. When you say you presented it,
22 you produced it in the course of this
23 litigation?

24 A. Yes.

25 Q. Did you -- did Ms. Joseph

1 BARBARA KIRKWEG

2 provide this statement to you?

3 A. Yes.

4 Q. When was that?

5 A. It's dated February 29th, so I
6 assume that's when she did it.

7 Q. What did you do upon receiving
8 this note?

9 A. Nothing.

10 Q. Did you talk to Sergeant
11 Mahaffy to confirm whether this had, in
12 fact, happened?

13 A. No, because Ms. Mandel had come
14 to me previously because she's actually the
15 one that had to go and get Mr. Mahaffy out
16 of the room because he would not respond to
17 Ms. Joseph.

18 Q. So, do you know whether or not
19 Ms. Mandel spoke to him about whether or
20 not --

21 A. I know she went to the room,
22 yes, and he still refused. And so she sent
23 him to a classroom and got one of the
24 sergeants to give the parents the uniform.

25 Q. How do you know this?

1 BARBARA KIRKWEG

2 A. Because she told me.

3 Q. When did she tell you?

4 A. I don't remember.

5 Q. But you never spoke to Sergeant
6 Mahaffy about it?

7 A. No, I didn't.

8 Q. Did you ever provide him with a
9 copy of this note?

10 A. I'm not sure if he got a copy
11 or not.

12 Q. How was Sergeant Mahaffy's
13 conduct unprofessional?

14 A. He was one of the Air Force
15 people who were in charge of issuing
16 uniforms. A parent and a new student was
17 at the school to get a uniform and he
18 refused to give the uniform.

19 Q. Did he offer any explanation?

20 A. I didn't discuss it with him.
21 As I said, Ms. Mandel, after Ms. Joseph
22 could not get him to get the uniform for
23 the parent, went and he still refused and
24 she sent him to a classroom and had one of
25 the other sergeants issue the uniform.

1 BARBARA KIRKWEG

2 A. I do.

3 Q. Have you ever seen it before?

4 A. Yes.

5 Q. What is it?

6 A. A letter to parents from -- it
7 says, "Members of the Bronx Aerospace High
8 School Staff."

9 Q. Do you know when you first
10 received a copy of this letter?

11 A. I don't know when I first
12 received it, no. I know a parent brought
13 it. I don't know what day it was.

14 Q. So, a parent brought it to your
15 attention?

16 A. Right.

17 Q. What did they -- how did they
18 bring it to your attention?

19 A. They brought it into the school
20 and said they received it at their home
21 through the mail.

22 Q. Did they say anything else?

23 A. No, I don't recall anything
24 else.

25 Q. What was your reaction upon

1 BARBARA KIRKWEG

2 reading the letter?

3 A. I don't remember. Probably
4 shock.

5 Q. Why would you have been
6 shocked?

7 A. Well -- well, I think it's not
8 something that I with consider normal fair
9 for teachers, staff members, to do.

10 Q. Why is that?

11 A. Because it's a letter that's
12 extremely derogatory in nature and asks
13 people to write to the mayor. I mean, this
14 is not something that usually happens in
15 high schools, as far as I know.

16 Q. So, the teachers, this wasn't
17 part of their job duties?

18 A. Not something that the
19 principal would be compensating them for,
20 no.

21 MR. FOLEY: Objection.

22 Q. When you received this letter,
23 whom did you think drafted it?

24 MR. KRETZ: Objection.

25 A. Members of the Bronx Aerospace

1 BARBARA KIRKWEG

2 High School staff.

3 Q. Did you think Sergeant Mahaffy
4 had been involved in drafting it?

5 A. I thought there was a air
6 amount of information about Junior ROTC,
7 that only Junior ROTC people would have.
8 Not specifically him, but the other two and
9 I'm not sure teachers would know the
10 specifics that are contained in there.

11 Q. Did you ever tell anyone that
12 you thought Sergeant Mahaffy drafted it?

13 A. Absolutely not.

14 Q. Did you talk about this letter
15 with anyone at the school?

16 A. Oh, I don't recall. I'm sure
17 it was common knowledge after the children,
18 you know, talked about it.

19 Q. Common knowledge about whom?

20 A. Among everybody at the school
21 that it was going to the children's homes.

22 Q. Did you discuss it with
23 Ms. Mandel?

24 A. Probably.

25 Q. Do you recall the substance of

1 BARBARA KIRKWEG

2 things.

3 Q. Now, it contained three
4 numbered points, correct?

5 A. Correct.

6 Q. Well, strike that.

7 You said you were shocked when
8 you received the letter. Were you upset
9 that teachers would have sent this to
10 parents?

11 A. Well, I think any principal
12 who, having something like this brought to
13 their attention, without -- at the hands of
14 a parent, would consider it a little bit
15 unusual.

16 Q. Did you think that this was
17 something that should have been addressed
18 in-house if there were concerns about it?

19 A. Clearly.

20 Q. Should they have come to you
21 first?

22 A. I don't know that they
23 necessarily should have come to me because
24 there were other administrators at the
25 school, but I don't think that they should

1 BARBARA KIRKWEG

2 have gone to parents.

3 Q. Why not?

4 A. Because parents don't run the
5 school.

6 Q. Did you view this as going
7 outside the chain of commands?

8 A. Not so much a chain of
9 commands. I viewed it as something that
10 was unprofessional and defamatory, and it
11 should not have been done.

12 Q. Did you believe that the
13 parents had a need to know this
14 information?

15 A. Were the information true, I
16 think that could have been, but I disagree
17 with what was there.

18 Q. So, if this were true, it would
19 be something that should be addressed to
20 the parents?

21 MR. FRIEDMAN: Objection.

22 A. Not initially. I think if this
23 were brought to the attention of parents,
24 it should be through the department of ed
25 by changing things in the school because

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BARBARA KIRKWEG

that's who run the school. The parents do not.

Q. What did you do upon receiving this letter?

A. I don't remember if I did anything specifically other than read it and become shocked.

Q. Did you try to find out who drafted it?

A. No, I did not.

Q. Why not?

A. Because it was unimportant.

Q. Did you contact any of the individuals listed here to see if any of these students or any parents and ever reached out to them?

A. Absolutely not.

Q. Now, you had said the things -- what's contained this letter aren't true. With respect to point one, I think point one discusses students running the JROTC program?

A. Right.

Q. Did you disagree with that?

1 BARBARA KIRKWEG

2 another school?

3 A. That's right.

4 Q. In making the decision to
5 terminate Sergeant Mahaffy's employment
6 with the school, did you consider this
7 letter as part of that decision?

8 A. I considered the documents that
9 were attached to the letter notifying him
10 of his termination.

11 Q. But you suspected that he had
12 been involved in writing this letter?

13 MR. KRETZ: Objection.

14 A. I had no opinion about him one
15 way or the other, except there were Air
16 Force specifics here which would have meant
17 they had input from Air Force people.

18 Q. Did you have any understanding
19 as to whether or not Sergeant Sidbury had
20 provided that information?

21 A. I had no idea who did it.

22 Q. Who about one of the other --
23 who else was an ROTC instructor at that
24 point?

25 A. Sidbury, Mahaffy, McCoy.

1 BARBARA KIRKWEG

2 unique military affiliation, could lose Air
3 Force funding because of rule violations
4 and \$66,800 in unaccounted money"?

5 A. Right.

6 Q. Is that a reference to the Air
7 Force probation that you've been notified
8 of in April of 2008?

9 MR. KRETZ: Objection.

10 A. I don't know.

11 Q. I'll go to the second sentence.
12 "The Bronx Aerospace Academy, which had one
13 of the City's highest graduation rates in
14 2006, this crown jewel of the small high
15 school movement, was told by the Air Force
16 last month it had been placed on
17 probation."

18 Do you see that as the second
19 paragraph?

20 A. I see that, yes.

21 Q. Does that appear to be a
22 reference to the Air Force probation from
23 April 2008?

24 A. It could be.

25 Q. Did you speak with the reporter

1 BARBARA KIRKWEG

2 before the story was published?

3 A. The day before, yes, she called
4 me.

5 Q. What did you tell the reporter?

6 A. We had a conversation. I don't
7 remember everything I said.

8 Q. Anyone from the City or
9 Department of Education assist you in
10 talking to the reporter?

11 A. No, she telephoned me directly.

12 Q. Did you talk to anyone from the
13 DOE about what to say?

14 A. No.

15 Q. Did you provide any -- did you
16 receive any guidance from the Department of
17 Education? Did they have a public
18 relations department?

19 A. I can't remember receiving
20 guidance. I'm sure after she contacted me,
21 I would have called the president's office
22 saying I had been contacted by a press
23 reporter. But it would not have been
24 before she called me.

25 Q. Do you know who you spoke with

1 BARBARA KIRKWEG

2 e-mail to Ms. Feinberg?

3 A. Apparently not, but it looks
4 like I did.

5 Q. Do you know who Ms. Feinberg
6 is?

7 A. She works in the press office.

8 Q. Is she the person that you
9 spoke to about -- the contact from The
10 Daily News report?

11 A. Probably I would have spoken
12 with her, yes.

13 Q. It indicates in the first
14 sentence, "Thank you for speaking with me
15 today."

16 So, is it fair to say that you
17 spoke with her on May 12, 2008?

18 A. Probably.

19 Q. You indicate in the final
20 sentence, the third paragraph, "The points
21 I would like to make to Ms. Einhorn who has
22 a copy of the letter are," and you outline
23 a number of points.

24 Did you discuss this with
25 Ms. Feinberg?

1 BARBARA KIRKWEG

2 A. No, apparently I just written
3 this to her then.

4 Q. So, is this what you did
5 discuss with her earlier that day?

6 A. I don't remember having the
7 discussion with her until you just showed
8 me. I don't remember this.

9 Q. You indicate in the e-mail, the
10 first point, it's in reference to the
11 discrepancy in Air Force funds, that "Only
12 Air Force sergeant had access to the funds
13 during the time period in question"?

14 A. Right.

15 Q. "And, therefore, the
16 discrepancy must be answered by Air Force
17 personnel"?

18 A. Right.

19 Q. What is that a reference to?

20 A. I'm assuming that this reporter
21 had called me and said she had a copy of
22 this letter. And I'm saying that I had no
23 opportunity to misuse or unaccount for
24 \$66,800 because I did not have access to
25 the funds, which is what I stated to the

1 BARBARA KIRKWEG

2 reporter.

3 Q. When you say you didn't have
4 assess to the funds, talking about at that
5 time?

6 A. It specifically gives a period
7 of time that the funds were missing, and
8 I'm saying, then you've got to ask the
9 sergeants because I didn't have access to
10 it.

11 Q. But previously, you had access
12 to the Air Force funds?

13 A. Doesn't talk about previously.
14 It talks about a specific term.

15 Q. But my question is:
16 Previously, did you have access to the Air
17 Force funds?

18 A. Yes, and previously I received
19 a letter that said that the discrepancy was
20 not more than \$3,000. Which, in my
21 estimation, is considerably less than
22 66,800.

23 Q. Turning back to the article
24 that you have in the exhibits, I believe
25 it's 45.

1 BARBARA KIRKWEG

2 A. Okay.

3 Q. If you turn to the eighth
4 paragraph --

5 A. Okay.

6 Q. It says that "Kirkweg said the
7 Air Force probation came on the words of a
8 retired Air Force sergeant whose she's
9 firing from the ROTC program. That
10 sergeant she said, is one of the people in
11 charge of the ROTC account while funds were
12 in question."

13 Do you recall discussing this
14 with the reporter?

15 A. I don't remember those exact
16 words, but I think that is my general
17 belief.

18 Q. Did you tell the Reporter that
19 the probation came on the words of an Air
20 Force sergeant that you were firing from
21 the ROTC program?

22 A. I could have. I don't remember
23 specifically.

24 Q. How else would the reporter
25 have gotten the information?

1 BARBARA KIRKWEG

2 Q. Now, turning back to the
3 article, it indicates, the same paragraph
4 I'm referring to earlier that, "Kirkweg
5 said that the Air Force probation came on
6 the word of a retired Air Force sergeant
7 that she was firing from the program."

8 Did you believe that the Air
9 Force probation came off Sergeant Mahaffy's
10 word?

11 A. I did.

12 Q. Why did you believe that?

13 A. Well, I think previous to that,
14 we had had a meeting with people that he
15 invited from the Air Force and shortly
16 after the meeting, we were placed on
17 probation. So, I thought not just him, but
18 the sergeants were, you know, involved in
19 the Air Force coming to that decision.

20 Q. But here you only reference one
21 Air Force sergeant.

22 A. Again, that could have been
23 something that she took to mean just one.
24 I don't remember if I said sergeant or
25 sergeants. I certainly think that they all

1 BARBARA KIRKWEG

2 MR. KRETZ: Objection.

3 A. One is written with the full
4 name and one appears to be just initials.
5 That's the way it appears to me.

6 Q. Did you ever instruct Sergeant
7 Mahaffy or sudden berry to use ROTC funds
8 for any particular purpose?

9 A. I did not instruct him to use
10 ROTC funds for any particular purpose, no,
11 I did not.

12 Q. Did you ever ask Sergeant
13 Mahaffy or sergeant sudden Berry to
14 reimburse the school for any expenditures?

15 A. I think we had some trips that
16 they had spent money for that we asked them
17 to pay for something else instead of that,
18 but they've never written a check to the
19 school, no.

20 Q. When was this -- when you are
21 referring to reimburse the school for
22 expenses --

23 A. During the course of the years,
24 there were times when they wanted to go
25 places, they didn't have funds, the school

1 BARBARA KIRKWEG

2 Q. Did you instruct them to pay
3 the banquet on behalf of the school?

4 A. I could not instruct them to do
5 anything with the funds. I could ask that
6 they do something for the school as the
7 school had done for them.

8 Q. Did you ask them to?

9 A. I'm sure over the course --
10 yeah, like I remember a banquet. I
11 remember that because I have seen it in
12 these documents that were presented by
13 Mr. Mahaffy.

14 Q. So, the Air Force funds were
15 used to pay for the school -- is that the
16 end of the year banquet?

17 A. Let me try this again. All of
18 the students in the school were members of
19 Junior ROTC, so Air Force funds could be
20 used to pay for functions that those
21 children attended.

22 Q. So, it was appropriate to use
23 that?

24 A. In my opinion, yes.

25 Q. Did you ever instruct Sergeant

1 BARBARA KIRKWEG

2 Mahaffy to loan money from the ROTC account
3 to a teacher or instructor at the school?

4 A. I could not instruct Sergeant
5 Mahaffy to do anything with the money and I
6 did not.

7 Q. Did you ever ask him to?

8 A. No.

9 Q. Are you aware of a loan that
10 was made -- strike that.

11 Are you aware of a loan that
12 was made to a Mr. Brasswell?

13 A. I am aware of it.

14 Q. Whose Mr. Brasswell?

15 A. He is a substitute teacher at
16 the school.

17 Q. What does he teach?

18 A. He teaches physical education.

19 Q. Were you aware of a loan that
20 was made to him in the amount of \$2,000
21 from the Air Force funds?

22 A. I'm aware of it.

23 Q. Were you aware of it before the
24 loan was made?

25 A. Not before the loan was made.